United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1406

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P/S

UNITED STATES COURT OF APPEALS

For The Second Circuit

IN THE MATTER OF

THE GRAND JURY SUBPOENA

SERVED ON JOHN DOE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANTS

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Preliminary Statement

In appellants' initial Brief, we (1) demonstrated the existence of a prima facie case of prosecutorial misconduct, involving, in part, the prosecutors' misuse of grand jury process, and violation of the targets'* Sixth Amendment rights, and (2) cited the authorities which authorized relief under these circumstances.

The Government in response, both on the merits and on the appealability issue, artfully seeks to paint appellants' application as a run-of-the-mill attempt to interfere with the internal workings of a grand jury which should not be judicially reviewed until an indictment is filed.

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* The references employed here are the same as those employed in our initial Brief ("App. Br.").

The Government thereby raises a straw man, since that does not correctly describe appellants' application.

What is involved here is prosecutorial misconduct resulting in a violation of appellants' Sixth Amendment rights. If the prosecutor had committed such misconduct violative of the targets' Sixth Amendment rights by speaking to Doe and coercing him directly, had installed a concealed listening device on Doe's telephone to hear his reports to counsel, or had directed that Doe be surveilled both to learn what Doe was doing and to interrupt all of Doe's interviews, the prosecutor would not be able to avoid judicial scrutiny by hiding behind the grand jury cloak of immunity. That the prosecutor, to interfere with the targets' Sixth Amendment rights, has ingeniously utilized the more sophisticated device of grand jury process, issued by the prosecutor himself, in connection with an alleged grand jury investigation (also initiated by the prosecutor himself), does not automatically immunize the prosecutor from the Court's power to supervise him.

The run-of-the-mill application seeking to interfere with the internal workings of the grand jury will be denied during the pre-indictment stage and not considered an appropriate subject for appeal because the only effect on the target of postponing judicial scrutiny is lapse of time and possible additional

expense of further proceedings. Whether a court considers a question about the propriety of evidence submitted to a grand jury before or after an indictment, the merits of that issue and the ability of that target to prepare for his defense do not change. Unlike such run-of-the-mill, internal grand jury workings issues, the instant prosecutorial misconduct is severable from the grand jury proceeding, has a continuing effect on the targets' ability to prepare their defense and could not be the subject of effective review after a trial.

The basic question on this appeal is whether the prosecutor, by the use of grand jury process, issued without any judicial scrutiny, in connection with a grand jury investigation commenced by the prosecutor without any judicial scrutiny, may continue to interfere with the targets' Sixth Amendment rights without being subject to the exercise of the Federal Courts' right and duty to supervise the prosecutor, to halt prosecutorial misconduct, and to fashion an effective remedy in connection herewith.

After miscasting the actual nature of this application, the Government, in its response, misstates the record in a number of respects in an effort to offer some factual justification for the prosecutors' institution of the grand jury investigation and service of the subpoena upon Doe. As shown in Point I hereof, no justification either exists or has been

offered. In any event, we show that appellants are not required to accept the prosecutors' self-serving and conclusory statements proffered in an effort to justify their conduct; rather, an evidentiary hearing should have been held.

The Government further argues that as a matter of law, this Court has no power at this juncture to review the decision below and claims that the District Court has no power to grant the relief requested or review the conduct of the prosecutors. In Points II and III hereof, we show that these contentions are without merit; as noted above, the policy which limits intrusions upon the proceedings of a grand jury is not applicable here. The law does afford appellants a remedy and they are not required to stand mute in the face of prosecutorial misconduct which deprives them of their fundamental Constitutional right to effective assistance of counsel.

POINT I

THE PROSECUTORIAL MISCONDUCT VIOLATIVE OF THE TARGETS' SIXTH AMENDMENT RIGHTS

The Government conceded at the hearing before Judge Werker that:

> "[I]t would be an outrageous event for the United States Attorney's Office to use the grand jury subpoena power to in anyway inhibit the [targets'] preparation of a criminal case . . . ." (Transcript of 8/27/76 Hearing at 7.)

But that is what happened here.

The record plainly shows that the Government commenced an obstruction of justice investigation and issued the subpoena to Doe (if we accept as true the statements contained in the Government's affidavit) on the basis of only the following facts which its affidavit claims it was told*:

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* The Government claims (Br. p. 3 fn.) without citation to the record that "[t]here is no dispute . . . as to what the Government was told before issuing the subpoena". That of course is incorrect and appellants made it clear at the hearing before Judge Haight (Transcript of 8/3/76 Hearing, at 18-21) that an evidentiary hearing was required so that they could discover what the Government in fact did know, and when it learned it, in order to confirm the prosecutors' misconduct here.

(1) Poe was cooperating with the Government in connection with an investigation of X Corporation and Roe.*

(2) Doe, a lawyer, was making inquiries of the present tenants in Poe's home, concerning the ownership of the home, falsely claimed that Poe did not own the home and asked to see any personal records Poe kept there. (Engel Aff. 9/3/76 at ¶ 6.)

(3) Doe had inquired about Poe's children. (Id. at ¶ 7.)

(4) Mr. and Mrs. Poe were apprehensive about their own safety and that of their children. (Id. at ¶ 8.)

This is all the Government claimed it knew when it issued the subpoena. Certainly it cannot be disputed that the foregoing information provides no justification for the prosecutor

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* The Government never concedes this fact; but appellants assume it to be true since the Government has never denied this fact. As set forth hereafter, the Government states that Roe suspected this to be the fact (Br. pp. 4, 16) in an effort to explain why the subpoena was issued. But as shown below, the Government did not claim in its affidavit or at the hearings below that it knew of Roe's suspicion before it issued the subpoena. Given the events involved in the service of the subpoena on Doe, it would not be surprising if Roe were to conclude that the only motivation for the prosecutors' actions was that Poe was cooperating with the prosecutor. But such a post-subpoena conclusion by Roe is irrelevant to what information the prosecutor had as a basis for issuing the subpoena.

to commence an obstruction of justice investigation and issue the subpoena to Doe. Inquiries of the third parties concerning Poe and his family could not under any theory constitute an obstruction of justice where, as here, the Government claimed it had no knowledge that the inquirer was related to the targets of a grand jury investigation or that inquiries were made in connection with the grand jury investigation. See United States v. San Martin, 515 F.2d 317 (5th Cir. 1975) (conviction of obstruction of justice reversed where threat made to witness was not made to inhibit future cooperation of witness with government). Unless the prosecutor was in fact aware of Doe's relationship to Roe and Y Corporation, Doe could have been anybody, asking about Poe and his family and property for any reason.

It cannot be the Government's contention that it is appropriate to commence an obstruction of justice investigation against any person who inquires about a person who is cooperating with the Government, but those are the only facts the Government claimed it knew when it issued the subpoena.

The only inference that can be drawn from the foregoing facts is that the Government knew of Doe's status and issued a subpoena with the obvious intention of stifling the investigation of Poe (App. Br. pp. 22) -- just the effect it had -- or that it issued the subpoena with such an utter disregard of the targets' Sixth Amendments rights so as to constitute prosecutorial misconduct in any event. An evidentiary hearing

will make this manifest and confirm that the Government has been guilty of the conduct it conceded would be "outrageous".*

The Government, obviously keenly aware of the deficiencies in its case, has in its Brief misstated the record in an effort to prevent this Court from drawing the only inference which could be drawn from the foregoing facts.

(1) The Government claims (Br. pp. 4, 16) in connection with the issuance of the subpoena that "Roe suspected . . . that Poe is cooperating with the federal government . . . ." But the Government never claimed below that it issued the subpoena because of Roe's alleged suspicions or that it knew this alleged fact at the time it issued the subpoena. It is only doing so now so as to create some link between the inquiries made by Doe (whom it knew to be a lawyer) and the investigation of Roe, but if the Government knew of such a relationship between Doe and Roe, then interfering with the targets' efforts to prepare their defense is indicated to be the motive for the prosecutors' acts.

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* The Government states in its Brief (p. 2) that at the time it issued the subpoena it did not know Doe's "identity". The Government clearly does not mean that since the subpoena served on Doe contained his correct full name and address. Obviously, Doe had provided the persons to whom he talked with identification. An evidentiary hearing would establish the extent of identification given by Doe, including information as to his relationship to the targets' attorney.

(2) The Government also states as a fact (Br. p. 4)* that it was told prior to the issuance of the subpoena that "Doe. . . interviewed the mailman who delivered mail to the Poe's [sic] household at which time he falsely claimed to be a court officer of the City of Yonkers."** But the record shows that the Government

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* This misstatement is repeated at page 16 of the Government's Brief.

** The Government in its Brief (p. 4 fn. 1) states in reference to this matter:

> "Doe's masquerade became apparent only after [Mr.] Walpin identified him as his investigator who was following his instructions in every respect (Walpin 8/27/76 Aff. at 6)."

This sentence is itself inaccurate in three respects.

First, the implication is that appellants concede that this so-called "masquerade" occurred. They do not.

Second, the Government implies it learned of Doe's status after it learned, on August 27, 1976, of the so-called "masquerade". But the Government concedes that it learned of it (Engel Aff. ¶13) at the latest when Mr. Walpin, on August 26, 1976, informed the Government of Doe's status, and thus before it received the alleged "masquerade" information.

Thirdly, the Government artfully implies that Mr. Walpin instructed Doe to "masquerade" as a court officer of the City of Yonkers. Walpin's affidavit stated as follows:

> "I have examined Mr. Doe on everything he has done in connection with his retainer by our firm. Based upon my examination, it is clear to me that he has done nothing that was contrary to my assignments and instructions and has done nothing which would involve any obstruction of justice. Indeed, the work he has done, by its very nature, indicates that no obstruction of justice was even possible."

Plainly, all Mr. Walpin stated was that, based on the information he had elicted from Doe, prior to the prosecutors' allegations of what Doe had supposedly done, Mr. Walpin believed that nothing Doe had said he had done was contrary to Mr. Walpin's instructions. Indeed, it is clearly implied from this that Doe denies that he masqueraded or committed any improper conduct at all. It is nothing short of outrageous that the Government, by artfully juxtaposing Mr. Walpin's statement that Doe was following his instructions with its claim of a "masquerade", implies that Mr. Walpin instructed Doe to "masquerade".

did not in its affidavit or at the hearings below claim that it learned these facts before it issued the subpoena. Indeed, AUSA Engel claimed in his affidavit (¶ 16) that these facts were learned after the subpoena was issued.

(3) The Government attempts to explain away AUSA Engel's statement that it was "probably" only on the morning of August 26th (when counsel for the targets called) that the Government knew for the "first time for certain" that Doe was a private investigator retained by counsel for targets, by stating (Br. p. 5 fn. 2) that the "use of the word 'probably' referred only to whether the information was received that morning, or the night before when Doe called [AUSA] Fortuin directly after receiving the subpoena." But that cannot be so. The Government's affidavit (Engel Aff. ¶ 12) only claimed that Doe informed Fortuin that he was a "lawyer" and a "former F.B.I. agent".*

(4) The Government, apparently concerned by its agreement to withdraw the subpoena, carrying with it an admission that the subpoena was in all events improperly served, states (Br. p. 6 fn. 2): "The subpoena was not withdrawn . . . explicitly because Doe would be protected by the work-product privilege (Engel Aff. ¶ 17)." But it was.

AUSA Engel stated at the hearing before Judge Haight (pp. 2-3, 6):

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* If there is confusion about when the Government learned of Doe's status as an attorney-investigator, the proper solution is for the District Court to hold an evidentiary hearing. We will never get to the bottom of this by exchanging affidavits.

"MR. ENGEL: . . . . This matter came on while I was on vacation . . . .

. . . , I looked at the papers and the transcript, much as you did, before Judge Werker and it became the government's position at that time, A, that Mr. Doe having been identified as a private investigator employed by Mr. Walpin in the firm of Rosenman, Colin under the relevant legal precedent indeed had a claim that he could refuse to be hauled before a grand jury or in any event assert a work product exception or privilege to any questions which might be put to him, any imaginable questions which might be put to him.

In that event I determined that the subpoena must be withdrawn . . . ."

* * *

"Unquestionably it seems to me, under the relevant precedent, Mr. Doe has a privilege which he may assert before the grand jury."

The essence of the Government's argument that the commencement of the obstruction of justice grand jury investigation was proper is contained at page 16 of its Brief. It states:

"Indeed no serious question of the propriety of commencing such an investigation can be raised. Poe, as a former employee of X Corporation and a close associate of Roe while so employed, was suspected by Roe and his attorney of cooperating with the federal government. In light of this fact, the conduct of Doe indeed raised a colorable, even vivid, basis upon which to undertake and continue an investigation of a possible violation of 18 U.S.C. § 1503 on the part of Doe. Specifically, Doe (a) falsely told the tenants of Poe's house that Poe did not own the house, (b) falsely held himself out to the Poe's mailman as a court officer of the City of Yonkers, and (c) inquired of the Poes' neighbors, inter alia, the whereabouts of the Poe children."

But, as noted, the record does not support the claim that the Government issued the subpoena because of Roe's suspicions or even that the Government knew of these alleged suspicions at that time. So also, the record shows that the Government did not know of the alleged "masquerade" until after it issued the subpoena. The only facts the Government did have are those set forth above (p. 6) and those facts could not constitute a basis for an obstruction of justice inquiry. Indeed, even the "facts" subsequently learned by the Government are insufficient to form a basis for the institution of the obstruction of justice inquiry.

But even more importantly, appellants have a right to an evidentiary hearing to establish the Government's improper motives and misconduct here. The appellants are not bound to accept the Government's self-serving statements as to the facts in the matter, nor are they required to accept the Government's conclusory statements as to the "propriety" of their investigation. The cases plainly so hold. See App. Br. p. 28 and cases cited infra at 32 fn.

It was for this reason that Judge Werker directed an evidentiary hearing.*

Judge Haight could not have made the factual finding, as the Government claims in the last paragraph of its Brief (p. 19), "that the government acted properly in initiating the grand jury investigation into possible obstruction of justice by Doe". Judge Haight plainly held that he lacked the power to

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* The Government in its Brief suddenly claims that there was no such direction. This is another misstatement. See App. Brief p. 11. In its affidavit submitted to this Court in opposition to appellants' request for an expedited appeal, the Government expressly conceded that "an evidentiary hearing was ordered to be held September 8, 1976 by the Honorable Henry F. Werker, United States District Judge" (Affidavit, AUSA Engel, 9/16/76, ¶ 11). Indeed, the record indicates Judge Haight so understood Judge Werker's direction (Transcript of 9/8/76 Hearing, at 2, 10):

> "THE COURT: We are going to continue the consideration of the grand jury subpoena served on Mr. Doe. This comes to me, of course, in Part I, Judge Werker having considered the matter last week. I should say to counsel that I have read all of the documents in the file, including the transcript of the proceedings before Judge Werker. What Judge Werker contemplated, it seems to me for today's activity, was an evidentiary hearing addressed to the several aspects of the relief set forth in the order to show cause . . . ."
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> ". . . [Judge Werker] clearly said in the transcript that . . . there would be an evidentiary hearing . . . ." (Emphasis added).

grant the relief requested.* Indeed, Judge Haight stated that if he found he had the power to grant the relief, he would hold an evidentiary hearing to determine the facts. (Transcript of 9/8/76 Hearing at 33-34.) And, in fact, the Government argued before Judge Haight that the Court should not make any factual finding since "the District Court is simply without jurisdiction" since "the relief sought is one which the law may not grant" Id. at 4, 11. In any event, even if Judge Haight had made the finding, it would be clearly erroneous. As shown (p. 7 supra), the Government's affidavit contained insufficient facts to indicate that an obstruction of justice had or might have occurred. And even if the Government's allegations were held sufficient, no finding could properly be made without affording the targets' counsel the opportunity to elicit testimony and cross-examine the Government witnesses in an evidentiary hearing. See cases cited App. Br. p. 28 and p. 32n. infra.

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* Significantly, in summarizing Judge Haight's decision, the Government, in its prior submission to this Court in opposition to appellants' motion for an expedited appeal, quoted only those portions of Judge Haight's decision which reflected his decision that he was without power. (Affidavit, AUSA Engel, 9/16/76, ¶ 15).

POINT II

THIS COURT PROPERLY HAS JURISDICTION OVER THIS APPEAL

Four separate statutory provisions provide authority for this Court on this appeal to review the decision below: 28 U.S.C. §1291 (appeal from final decision of district court); 28 U.S.C. §1651 (review by writ of mandamus); 28 U.S.C. §1292(a)(1) (appeal from an interlocutory order denying an injunction); and 28 U.S.C. §1292(b) (appeal by permission).*

A. 28 U.S.C. §1291

The District Court's decision, denying any relief to appellants, is appealable as a final order under 28 U.S.C. §1291.

We recognize that the policy behind this provision is an "insistence on finality and prohibition of piecemeal review [to] discourage undue litigiousness and leaden-footed administration of justice, particularly damaging to the conduct of criminal cases." DiBella v. United States, 369 U.S. 121, 124 (1962). However, as the Supreme Court has made expressly clear, this "concept of finality" of the entire litigation "as a condition of review has encountered situations which make clear that it need not invite self-defeating judicial construction" (id. at 125), and will not be applied to "deny effective review of a claim fairly severable from the context of a larger litigious process." Swift & Co. v. Compania Caribe, 339 U.S. 684, 689 (1950).

* The Government's present contention that the decision below is not subject to immediate review is contrary to the position it expressed in the District Court. When the Court below indicated it would hold an evidentiary hearing, the Government stated "that the legal issues are so important and so basic that we would not in any event proceed to an evidentiary hearing. We would seek review immediately" (Transcript of hearing of 9/8/76, p. 23).

Both justice and judicial precedent require consideration of the instant appeal as within §1291.

Initially, it is important to recognize that this appeal does not involve an order granting or denying a pre-indictment motion to suppress evidence, held non-appealable in DiBella. Such order is inseparable from any forthcoming trial as it "'will necessarily determine the conduct of the trial and may vitally affect the result.'" Id. at 127. It is that type of order which is non-appealable -- particular orders to individual witnesses pertaining to specific evidence -- not an order, as appellants sought here, which relates to the prosecutor's misuse of the entire grand jury proceeding, which is appealable.*

In essence, the Government disqualified Doe, the investigator-attorney retained by counsel for the targets, from continuing as an investigator in this litigation. Appellants sought an order remedying this wrong, preventing the continuation of such a violation of Constitutional rights, and reversing the "disqualification" of Doe so that he could return to serve as an investigator.

In Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 496 F.2d 800 (2d Cir. 1974) (en banc), this Court recognized that a determination of "finality" for appealability purposes

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* Orders directing individual witnesses to do or not do something may receive immediate review via a contempt adjudication. Appellants here do not have available to them that device for immediate appellate review. See Perlman v. United States, 247 U.S. 7 (1918).

"calls for a 'practical' rather than a 'technical' approach if the desideratum of an equitable result is to be attained." Id. at 802. In thus evaluating the issue there, this Court held appealable an order denying disqualification of an attorney, just as it had "long upheld the appealability of an order granting" disqualification. Id. at 805. This Court's explanation of its reason for granting immediate appeal in the disqualification context is equally applicable here:

> "In both situations the order is collateral to the main proceeding yet has grave consequences to the losing party, and it is fatuous to suppose that review of the final judgment will provide adequate relief." Id. at 805.

The prosecutors' misconduct here, in depriving the targets of Doe's services -- as surely as any order of disqualification -- is collateral to the IRS grand jury investigation; but the prejudice resulting to the targets' ability to prepare their defense is manifest. And it is no less fatuous here than in Silver Chrysler, to suppose that review of any final judgment after trial would provide adequate relief: such review would not allow, what would then undoubtedly be labeled, speculation as to evidence that might have been obtained by Doe if he had not been "disqualified," as a basis for reversing a final judgment; equity -- as well

as the Sixth Amendment -- requires that the targets be allowed at this time to utilize the investigative services of Doe, unencumbered by the effect of prosecutorial misconduct, thus avoiding any possible taint of a prosecution of them, because of their inability to utilize Doe's services. See International Business Machines Corp. v. Edelstein, 526 F.2d 37 (2d Cir. 1975) (defendant has right to interview witnesses).

This Court's concluding explanation for allowing the appeal in Silver Chrysler Plymouth is equally apt here:

> "Since the ultimate objective is to bring before an appellate court an important question which, if unresolved, might well taint a trial, why should not this question be presented before judicial and attorney time may have been needlessly expended?" 496 F.2d at 806.

The argument for appellate jurisdiction is even stronger here, since the issue arose in connection with prosecutorial misconduct in the pre-indictment stage, before a case has been commenced and is before the court. Matter of Grand Jury Empaneled January 21, 1975, 536 F.2d 1009, 1011 and n.1 (3d Cir. 1976). For, as the Court of Appeals for the District of Columbia recently explained, "a more expansive approach to the collateral order doctrine" is warranted "in the grand jury context than in the trial context since allowing such

appeals is less likely to involve 'the mischief of economic waste and of delayed justice.'" In Re Investigation Before April 1975 Grand Jury, 531 F.2d 600, 605 n.8 (D.C. Cir. 1976). For a similar view, see United States v. Wilson, 421 U.S. 309, 318 (1975).

Other decisions have allowed an appeal under §1291 where, although a grand jury investigation remained pending which might lead to an indictment, the appellant would suffer irreparable injury if not afforded immediate relief from an erroneous order. For example, in United States v. Doe, 455 F.2d 753 (1st Cir.), aff'd in part and vacated in part on other grounds sub. nom. Gravel v. United States, 408 U.S. 606, 608 n.1 (1972), the court held appealable an order denying a motion to quash a grand jury subpoena, where it was alleged that the subpoena violated the Constitutionally-protected immunity of a United States Senator by whom the subpoenaed witness was employed. The court there rejected the government's argument, similar to that made here, that the order was not appealable since "no injury is cognizable unless and until [the appellant] is indicted." Id. at 757. Rather, the court held that it must, "in determining whether an [appellant] will suffer irreparable injury unless allowed to appeal, . . . assume his claim to be correct." Ibid. The injury there was held to be irreparable since the appellant

was "'powerless to avert the mischief of the order' unless permitted to appeal it." Ibid.; Perlman v. United States, 247 U.S. 7 (1918). So too here, appellants are powerless to avert the mischief caused by the order below, and the prosecutorial misconduct which has interfered with their counsel's use of the investigative assistance of Doe, unless permitted to appeal the decision below. See also United States v. MacDonald, 531 F.2d 196, 199 (4th Cir. 1976), cert. filed, 45 U.S.L.W. 3005 (June 29, 1976); United States v. Alessi, 536 F.2d 978, 980 (2d Cir. 1976) (Alessi I).*

B. 28 U.S.C. §1651

This Court also has jurisdiction to review the decision below under 28 U.S.C. §1651, even though no formal petition for an extraordinary writ was served. Miller v. United States, 403 F.2d 77, 79 (2d Cir. 1968) (after determining an order was not appealable under §1292(a)(1), this Court treated the appeal as a petition for mandamus and reviewed the order); cf. United States v. King, 482 F.2d 768, 772-73 (D.C. Cir. 1973) (district judge is often only a nominal party in mandamus proceeding).

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* Alessi II, decided by the Court on July 7, 1976 (Slip op. 4781, 4801) and cited by the Government, does not alter the rule referred to in Alessi I and prior decisions. While two members of the Alessi II panel expressed personal views at variance with Alessi I, the Court in Alessi II expressly refused to depart from the precedent allowing such an interlocutory appeal in this circuit.

The cases show that mandamus will issue (1) to compel a court to exercise the power it possesses, e.g., Parr v. United States, 351 U.S. 513, 520-521 (1956); Roche v. Evaporated Milk Assn., 319 U.S. 21, 26 (1943); Interstate Commerce Commission v. United States, 289 U.S. 385, 394 (1933); Ex Parte Sawyer, 88 U.S. (21 Wall.) 235, 238 (1874); Ex Parte Newman, 81 U.S. (14 Wall.) 152, 165-66, 169 (1871), or (2) where important issues of "first impression" are raised, e.g., Schlagenhauf v. Holder, 379 U.S. 104, 111 (1964); In Re Ellsberg, 446 F.2d 954, 956 (1st Cir. 1971). Thus mandamus would be appropriate here because (1) Judge Haight held that the relief requested fell "beyond the boundaries of a proper exercise of this Court's powers," (Mem. op. at 5) and (2) this Court has never ruled on the power of the District Court in the pre-indictment stage (a) to enjoin prosecutorial misconduct interfering with a target's efforts to prepare a defense in connection with a grand jury investigation and (b) to enjoin a grand jury investigation because of that same prosecutorial misconduct.

This Court has exercised its power of mandamus in criminal cases. E.g., United States v. Werker, 535 F.2d 198 (2d Cir. 1976); United States v. Dooling, 406 F.2d 192 (2d Cir.), cert. denied sub. nom. Persico v. United States, 395

U.S. 911 (1969). Recently, in United States v. Alessi II, supra, Slip op. at 4802, this Court noted its power to use "supervisory" or "advisory" mandamus to correct errors of a district court in a criminal case.* Thus, whether this proceeding be considered to be criminal, as claimed by the Government (Br. p. 12), or civil, as we contend (see pp. 25-26 infra), mandamus is appropriate here. Indeed, in International Business Machines Corp. v. Edelstein, 526 F.2d 37 (2d Cir. 1975), this Court granted mandamus where, as here, the District Court's order had interfered with defendant's defense of the action.

Use of mandamus is particularly appropriate here in view of the Kafkaesque maze in which appellants will find themselves if the order below is held not appealable under §§1291 or 1292. This Court has previously indicated the rule against interlocutory appeals "requires that the applicant be satisfied for the time being with the determination of the district judge. . . ." In re Grand Jury Investigation of Violations, 318 F.2d 533, 538 (2d Cir.), cert. dismissed, 375 U.S. 802 (1963). But here, the District Court decided that it had no

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* The interplay between the final decision rule and mandamus was highlighted by this Court's suggestion in Alessi II that the presence of mandamus power might justify a narrow interpretation of the final decision rule. Slip op. at 4802.

power to consider the issues raised by the application below. Thus, appellants, if denied an appeal to this Court, are in the position of being told to be satisfied with a decision never rendered because the District Court felt itself powerless to act.

A decision on this important issue of first impression in this Court with respect to the power of a District Court to grant relief in the pre-indictment stage because of prosecutorial misconduct is required in order to provide appellants with a meaningful day in court and is essential "to the sound administration of criminal justice". United States v. Dooling, supra at 199.*

C. 28 U.S.C. §1292(a)(1)

Section 1292(a)(1) of Title 28 U.S.C., authorizes an immediate appeal from an interlocutory order of the district court denying an injunction. That relief was expressly requested by appellants and denied by the Court below. Thus, the motion below requested an order

> "(b) Enjoining the United States Attorney and the Grand Jury from proceeding with the investigation of X Corporation and/or Richard Roe;

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* The Government below itself stated "that the legal issues are so important and so basic" that it "would seek review immediately" if the District Court had ruled against the Government by ordering an evidentiary hearing (Transcript of Hearing of 9/8/76, p. 23).

"(c) Enjoining the United States Attorney, the Grand Jury, or any of his or its agents, from further interference with the investigation by and on behalf of counsel for X Corporation and/or Richard Roe; . . . ."

A denial of an injunction against law enforcement officials was held appealable, under §1292(a)(1), in Dostal v. Stokes, 430 F.2d 1299 (6th Cir. 1970). The law enforcement officials there involved were state officials; a fortiori, the District Court's order, denying an injunction against federal law enforcement officials, is appealable, given the responsibility imposed on the federal courts to supervise the latter's performance of their duties.*

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* In re Grand Jury Investigation of Violations, 318 F.2d 533 (2d Cir.), cert. dismissed, 375 U.S. 802 (1963), does not require a different result. That decision held that an order denying a motion to quash or to suppress evidence -- a non-appealable interlocutory motion -- could not be converted into an appealable motion by simply dressing the motion in injunction-type language. Id. at 536. Here, the substance of the relief sought cannot be equated to motions directed at specific evidence or witnesses. Rather, the relief sought was inter alia, an injunction against further interference by the prosecutor and/or the grand jury with the targets' Sixth Amendment rights. Further, it is interesting to note that this Court, in Violations, analogized the relief sought there to a motion seeking the disqualification of an attorney, the denial of which had been, as of that date, held non-appealable. After the decision in Violations, the two decisions there relied on by this Court [Fleischer v. Phillips, 264 F.2d 515 (2d Cir.) cert. denied, 359 U.S. 1002 (1959) and Marco v. Dulles, 268 F.2d 192 (2d Cir. 1959)] were expressly overruled in Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., supra, 496 F.2d at 806, thus casting doubt on the continued vitality of Violations.

The Government argues (Br. p. 12) that the District Court order is not appealable under 28 U.S.C. §1292(a)(1) because that section "is addressed either in terms or by necessary operation solely to civil actions," DiBella v. United States, 369 U.S. 121, 126 (1962), and "the grand jury investigation is by its terms a criminal matter. . . ." The Government offers no authority for labeling this proceeding as "criminal," and is in error in so contending: the order appealed from arises out of a separate proceeding commenced by appellants, not a criminal action commenced by the Government; since criminal proceedings may be commenced only by the Government. this proceeding must be considered to be civil.

An analogy may be drawn to habeas corpus proceedings. It is settled that habeas corpus proceedings are civil proceedings, e.g., Fay v. Noia, 372 U.S. 391, 423-24 & n.34 (1963); Cross v. Burke, 146 U.S. 82, 88 (1892), even when habeas corpus is instituted to arrest a criminal proceeding, Ex Parte Tom Tong, 108 U.S. 556 (1883); Kurtz v. Moffitt, 115 U.S. 487, 494 (1885). In Tom Tong, the Supreme Court held that a habeas corpus proceeding commenced prior to trial by a prisoner was a civil proceeding collateral to the criminal prosecution. The case at bar is the same: the proceeding

commenced by appellants is separate from and collateral to the grand jury investigation; and here, as in Tom Tong, no consideration of the merits of any potential criminal prosecution needs to be made in order to resolve appellants' motion for an injunction. Thus, the proceeding commenced by the appellants below is a "civil action", such that an appeal may be taken under 28 U.S.C. §1292.*

D. 28 U.S.C. §1292(b)

This Court has jurisdiction under 28 U.S.C. §1292(b) to allow this appeal, even if the district court's order is not appealable as a final order or as a denial of an injunction. United States v. MacDonald, 531 F.2d 196, 199-200 & n.3 (4th Cir. 1976), cert. filed, 45 U.S.L.W. 3005 (June 29, 1976) (interlocutory appeal allowed from order denying motion to dismiss indictment for alleged violation of defendant's Sixth Amendment rights to speedy trial).

Appellants, of course, recognize that they did not petition the district court or this Court for permission to take an interlocutory appeal, pursuant to 28 U.S.C. §1292(b) and Rule 5 of the Federal Rules of Appellate Procedure. But the absence of such

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* These comments apply equally to §1292(a)(1) and §1292(b). For an example of an appeal similar to the one involved in this case, but under §1292(b), see United States v. MacDonald, 531 F.2d 196 (4th Cir. 1976), cert. filed, 45 U.S.L.W. 3005 (June 29, 1976) discussed in the following paragraph of the above text.

procedural step does not bar this Court's exercise of its discretion to allow this appeal under §1292(b). As Professor Moore has stated:

> ". . . if an order is arguably reviewable by virtue of some other provision, and the question presented is of a kind that would be certifiable under §1292(b), the court of appeals can, if it finds the order in fact to be non-appealable, proceed to determine the question on the assumption that the district court would or should have certified it." 9 Moore, Federal Practice ¶110.22[3] at 263 (2d ed. 1975).

See also Gillespie v. U. S. Steel Corp., 379 U.S. 148, 154 (1964).

This procedure, under which this Court would determine whether or not a decision of the district court should be reviewed in this Court by reference to the substance of the issue, rather than the specific piece of paper utilized by the appellant to obtain that review, is consistent with the policy enunciated by this Court en banc in Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., supra. There, this Court detailed the procedural maze created by the appellant's uncertainty as to which of four possible avenues for appeal would be accepted by this Court. To obtain a measure of certainty, the appellant filed a notice of appeal, a motion in the district court to obtain a §1292(b) statement, a motion in this Court for permission to appeal, and a petition for mandamus -- each, except for the notice of appeal, including, as this Court described it, "the same repetitious statement of fact and law and each requir[ing] time-consuming consideration by the courts." 496 F.2d at 802.

Indicating its distaste for the procedural morass created by that appellant's fright at missing the correct procedural avenue to obtain a review from the Court of Appeals, this Court went to the heart of the question by stating that the "upshot of all these maneuverings is to bring before us the simple question . . . : is the order . . . appealable?" Ibid.

Here, to avoid the waste of the time of this Court and the Court below with applications and repetitious papers (and, concededly, due to our view that the order below was appealable pursuant to §1291 and §1292(a)(1)), these numerous different applications were not made on this appeal.

The basic question, however, still remains: as a matter of equity and justice to appellants, and as a matter of insuring the proper administration of justice by the district court and the proper exercise of the prosecutor's power, should this Court review the decision below?

The allegations of prosecutorial misconduct violative of the targets' Sixth Amendment rights are serious. A denial of review by this Court would leave the targets at the mercy of continuing prosecutorial misconduct during the crucial time in which they and their counsel must prepare their defense. Such a result would seriously impede the targets' defense, with the only "remedy" left to them being a right to review, at some later date when, as and if an indictment is filed, and a trial and a conviction occurs. Such result would inequitably prefer

the procedural form involved in denying review of non-final decisions over the substance of the serious and irremediable prejudice to the targets: a review after a conviction could not determine the evidence lost to the targets due to their inability to utilize Doe's investigative services during the pre-indictment period and, realistically viewed, it is less likely that a court would overturn a conviction on the possibility that evidence could have been obtained by an investigator than a jury would acquit based on evidence actually obtained by that investigator.

Moreover, it is unthinkable that this Court would allow to stand, unreviewed, a decision that the power of the Federal Courts to supervise the administration of justice is non-existent during the pre-indictment stage, and that the prosecutor therefore is free, during that period, to engage in any sort of misconduct without being subject to immediate review by a federal court.

POINT III

THE DISTRICT COURT HAS THE POWER TO GRANT THE RELIEF SOUGHT

The crux of the wrong, for which appellants sought relief, was the prosecutorial misconduct which violated the targets' Sixth Amendment rights. The crux of the remedy appellants sought was an injunction against the United States Attorney "from further interference with the investigation by and on behalf of counsel for X Corporation and/or Richard Roe" (order to show cause). In connection therewith, appellants also sought (a) to enjoin the grand jury, to the extent it was being used as a device for prosecutorial interference with the targets' Sixth Amendment rights, and (b) to enjoin continuation of the investigation against X Corporation and Roe as a consequence of the violation of their Sixth Amendment rights.

The Government in its Brief never addresses itself to this request for relief against the prosecutor -- nor did the Court below. Instead, the Government artfully attempts to transpose this application into a run-of-the-mill attempt to interfere with the inner workings of a grand jury, by relying on cases and arguments which, at best, stand for the proposition that the grand jury -- not the prosecutor -- may not be interfered with.

What the Government is thereby attempting to do is shield its <u>prosecutorial</u> actions from review by relying on the tra-

ditional reluctance of the Courts to interfere with grand jury proceedings. There is no Constitutional or precedental basis for this contention of prosecutorial immunity, and none is cited.

Indeed, there is an overriding public interest in halting prosecutorial misconduct when it occurs. Thus, as shown in our initial Brief (pp. 26-28), the District Courts have supervisory responsibility over the prosecutor and necessarily the Courts have the power to halt misconduct at any stage. For example, in In the Matter of John Doe, 410 F. Supp. 1163 (E.D. Mich. 1976), the Court, relying upon its "general supervisory role in the fair administration of justice", and dictates of "judicial integrity and 'the interests of justice'" enforced the "government's . . . promise" that a witness would not be questioned before a grand jury as to a particular matter where the government sought to breach the promise. See also cases at pp. 26-27 of our initial Brief. Grand jury proceedings were of course interfered with as a result.

A request to enjoin prosecutorial misconduct is simply not controlled by the policies which limit interference with grand jury proceedings. Those policies concern the desire to allow a grand jury proceeding to continue without judicial monitoring of the evidence being considered by it, and delaying minitrials concerning that evidence. In such instances, the final guilt or innocence of the potential defendant is unaffected by delaying judicial scrutiny until after an indictment is voted.

Except for the delay itself and the possibility of additional expense during that delay period, a potential defendant's rights can be fully protected by a finding after indictment that evidence was illegally seized. That balancing of the absence of real prejudice to a potential defendant, from delaying such applications until after indictment, as against the prejudice to the grand jury from minitrials which would be required if considered before indictment, warrants delay.

Here, no minitrials or other monitoring of the internal workings of the grand jury is sought. Appellants' claim is that the prosecutor's actions -- not the grand jury's inner workings -- amount to misconduct warranting appropriate judicial relief. Appellants' request for an evidentiary hearing is to determine whether the prosecutor acted with the purpose of interfering with the targets' Sixth Amendment rights or had a bona fide basis for serving the grand jury subpoena on Doe -- not to determine what was going on inside the grand jury or to interfere with its proceedings.

Hence, unlike in the run-of-the-mill grand jury context, there is no policy served here by immunizing the prosecutor from the supervision of the Court in the pre-indictment stage. Indeed, in numerous cases the prosecutors have been called to testify as to their conduct* and to compel them to do so at

* E.g., United States v. Hilton, 521 F.2d 164 (2d Cir. 1975); United States v. Rosner, 485 F.2d 1213, 1224 n.15 (2d Cir. 1973), cert. denied, 417 U.S. 950 (1974); see United States v. Miranda, 526 F.2d 1319, 1325 (2d Cir. 1975), cert. denied, 45 U.S.L.W. 3229 (October 4, 1976); United States v. Morell, 524 F.2d 550, 555 (2d Cir. 1975); cf. Alderman v. United States, 394 U.S. 165, 180-185 (1969).

this juncture would be no more burdensome than it would be after an indictment is returned.

On the other hand, appellants would be severely prejudiced if they were required to wait until after an indictment or a conviction to challenge the government's conduct. In connection with an investigation of this nature, it is essential for the targets to be able to commence their own investigation as soon as possible and to explore unimpeded* all avenues of information. The targets, as a result of the loss of Doe's services, certainly may have lost valuable evidence and leads but, concededly, no one could prove such loss of evidence to a certainty. Thus, raising a claim concerning this prosecutorial misconduct after the grand jury has voted to indict and after a petit jury has convicted, would certainly be met with the government's argument that, even if misconduct were found, no prejudice to the targets could be shown: the Government would undoubtedly argue that the targets' "speculation" that, if their defense had been left unimpeded by prosecutorial misconduct, they would have obtained relevant evidence and leads, does not rise to proof that such evidence and leads in fact existed. It is for this reason that appellants here should have been granted an immediate injunction against prosecutorial misconduct when they requested it, so that they could prepare their defense unimpeded.

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* The District Court and the Government recognized that there is nothing improper with such an investigation. Transcript of 9/10/76 Hearing at 10. We showed in our initial Brief (pp. 24-25) that such an investigation is not only proper, but is a matter of Constitutional right.

This balancing of the irremediable prejudice to the targets, if required to wait until indictment and/or conviction against the absence of any prejudice to the grand jury, demonstrates that the decisions relevant to interferences with the internal workings of the grand jury are inapposite where, as here, appellants seek to halt misconduct by the prosecutor.

Assuming arguendo that the portion of the relief requested which weeks to enjoin the grand jury is beyond the pre-indictment power, it is axiomatic that the District Court has power to grant the other relief requested.

But beyond that, under the circumstances present here, and as discussed in detail in our initial Brief (pp. 33-40), no bar exists against enjoining the use of the grand jury to interfere with the targets' Sixth Amendment rights.

All that the Government's Brief states (Br. p. 14), with respect to the cases we cited in our initial Brief, is that in none of them did the Court enjoin a grand jury investigation on the basis of prosecutorial misconduct. But the point is that the cited authorities show that the courts do have this power and, if ever there were a case where it should be exercised, it is the instant case where we allege that the grand jury is being misused by the prosecutor to interfere with the targets' Sixth Amendment rights. For the same reasons as discussed above, see pp. 31-33 supra, the policy which makes courts reluctant to interfere with internal workings of a grand jury has no relevance to the instant case of prosecutorial misconduct.

To repeat an argument made in our preliminary statement to this Reply Brief: there can be no dispute as to the District Court's power to halt prosecutorial misconduct violative of the targets' Sixth Amendment rights, if accomplished through less sophisticated devices, such as verbal threats or physical coercion addressed to Doe, physical surveillance of Doe, or concealed listening devices to overhear Doe's activities and communications with counsel. That the prosecutorial misconduct here is alleged to involve misuse of the grand jury as the prosecutor's device to interfere with the targets' Sixth Amendment rights should not deprive the District Court of its power to halt prosecutorial misconduct.

Conclusion

The decision below should be reversed and remanded with instructions to hold an evidentiary hearing, following which, if prosecutorial misconduct is established, the District Court should grant appropriate relief.

Respectfully submitted,

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